

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

ANDRÉ SMITH,

Plaintiff,

08-CV-6029-CJS

-vs-

DECISION and ORDER

ELLIOT SPITZER, *et al.*,

Defendants.

Siragusa, J. Before the Court is Plaintiff's motion (Docket No. 8) for a default judgment pursuant to Federal Rule of Civil Procedure 55(b)(2). In this case, Plaintiff alleges that three defendants, Fredrick Lamy, Frances Sullivan and Daniel Stewart, have been served and failed to file an answer within the required time period. Since Plaintiff has not yet obtained an entry of default against any of the named defendants, the motion for a default judgment is denied without prejudice. Rule 55(a) of the Federal Rules of Civil Procedure requires that prior to granting a motion for a default judgment the Clerk of the Court must make entry of default. *See Dow Chem. Pacific Ltd. v. Rascator Maritime, S.A.*, 782 F.2d 329, 335 (2d Cir. 1986); *Hircsh v. Innovation Intern., Inc.*, 1992 WL 316143, *1 (S.D.N.Y. Oct. 19, 1992). Therefore, Plaintiff's motion is deemed to be a request for entry of default.

The Court finds that the proof before it is sufficient for entry of a default with regard to each of the three defendants named above.

Following entry of default, Plaintiff may file a motion for default judgment. Plaintiff is advised that the decision as to whether or not a default judgment should be entered is left to the sound discretion of the district court. *See Shah v. New York State Dep't of Civil Service*, 168 F.3d 610, 615 (2d Cir.1999)). In deciding a motion for default a court should

consider the following factors: 1) whether the default was willful; 2) whether defendants have a meritorious defense to the plaintiff's claims; and 3) the level of prejudice the plaintiff would suffer as a result of the denial of the motion for default judgment. *See Mason Tenders District Council v. M & M Contracting & Consulting*, 193 F.R.D. 112, 114-15 (S.D.N.Y. 2000). Accordingly, it is hereby

ORDERED, that the Clerk shall enter a default against defendants Fredrick Lamy, Frances Sullivan and Daniel Stewart pursuant to Federal Rule of Civil Procedure 55(a).

IT IS SO ORDERED.

Dated: September 16, 2008
Rochester, New York

ENTER:

/s/ Charles J. Siragusa
Charles J. Siragusa
United States District Judge